IN THE HIGH COURT OF JUDICATURE AT BOMBAY NAGPUR BENCH NAGPUR.

APPEAL AGAINST ORDER NO. 24 OF 2005

Gajanan Ganuji Shinde
and another APPELLANTS.

VERSUS

Prashant Manikrao Gaigole
and another RESPONDENTS.

Shri. A. S. Chandurkar, Counsel for the appellants.
Shri. C. A. Joshi, Counsel for the respondents.

CORAM: S. A. BOBDE J.
Date: 16th JANUARY 2006.

ORDER:

This appeal is against the judgment and order of the

appellate Court remanding the matter back to the trial Court for recording further evidence and for deciding the matter as such on the basis of the additional evidence so recorded. The petitioner is a defendant in a suit filed against him for declaration and injunction over the land admeasuring 81 R. in Gat No. 24/1. The trial Court framed and answered the issues as follows:

1.Whether it is proved that plaintiff No.1 is owner and in possession of 0.81 R of land in Gat. No. 24/1?	Negative
2.Whether it is proved that plaintiff No.2 is in possession of another land admeasuring 0.81 R in Gat No. 24/1?	Negative
3.Whether the suit property is described properly as regards the boundaries?	Negative
4.Whether plaintiffs prove that the defendants obstructed in possession of plaintiffs over their respective lands?	Negative
5.What relief, if any?	Suit is dismissed with no order as to costs.

It is the decision pertaining to issue No.3 which has given rise to the remand by the appellate Court. The appellate Court came to the conclusion that respective shares of the plaintiffs have not been properly determined after the sale of the land to them by their vendor. The trial Court has found vide 11 of its judgment that there is evidence regarding the title of the plaintiffs. However, there is no evidence to determine the extent of the land since there is no sketch of the respective shares of the parties and the boundaries of the respective shares are not known. The appellate Court has specifically observed that the evidence available on record does not include the evidence of independent person who was present at the time of actual delivery of the possession of the respective shares amongst the parties to the procedings. Therefore, there is ambiguity in the case of similarity of the boundaries in the gift deed and sale deed under reference. It is purely due to this reason that the appellate Court has remanded the matter. It is obvious from the issues that arise in the suit, that the plaintiffs suit has been dismissed because

he is even found not to be the owner and in possession of 81 R of Gat No.24/1 which is adjoining to the defendants. It must also be noted that plaintiffs had claimed exclusive ownership of the suit land and any injunction restraining the defendants-petitioners herein from interfering and disturbing their peaceful possession over the suit property. In a suit such as this, it is needless to say that what is the exact extent of the suit property is crucial and mere title deeds do not help the Court to arrive at the proper finding as to whether any party should be restrained from disturbing the possession of the land of the another party. Shri Chandurkar the learned counsel for the appellants mainly relied on the decision of the Supreme Court in **P. Purushottam Reddy And Another .vs. Pratap Steels Ltd. (2000)2 Supreme Court Cases 686,** where the Supreme Court in a different set of facts observed inter alia that the Court is not empowered to exercise its powers under Section 151 of the Civil Procedure Code if the case did not fall under Rule 23 and Rule 23-A of Order 41 Civil Procedure Code. Their Lordships also observed

that the appellate Court should be circumspect in ordering the remand when the case is not covered under Rule 23-A or 23 or Rule 25 Civil Procedure Code. I find that the present case is not a case of remand by the appellate Court under Section 151 Civil Procedure Code. Rule 23-A of Order 41 Civil Prcedore Code reads as follows:

> 23-A: "**Remand in other cases**:- Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23."

In the present case I am satisfied that the appellate Court has found a genuine difficulty in dealing with the matter in the absence of specific proof regarding the title of the parties over their respective shares and the extent of the areas in their possession. This is clearly, therefore, a matter within the ambit of Rule 23-A. In this view of the matter I am of the view that there is no merit in this appeal which is hereby dismissed. It is made clear that the direction No.4 of the appellate Court

is not intending to order the entire trial de novo but as stated by the appellate Court itself, the trial Court has been directed to record a finding de novo on the basis of additional evidence regarding specific boundaries of the respective shares of the parties in Survey No. 24/1. The appeal is therefore dismissed.

JUDGE

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